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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KARIM ALI, SR. et al.,

Plaintiffs and Respondents,

v.

909 GEARY STREET LLC,

Defendant and Respondent;

ADMIRAL INSURANCE COMPANY,

Movant and Appellant.

_____/

A098598/A099700

(San Francisco County Super.Ct.No. 309823)

Admiral Insurance Company appeals contending the trial court erred when it denied its motion to intervene and its motion to vacate the judgment. We conclude the trial court did not abuse its discretion when it denied Admiral's intervention motion, and that Admiral lacked standing to vacate the judgment. Accordingly, we will affirm the trial court's rulings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Hotel Hartland is a residential hotel located in San Francisco's Tenderloin district. It is owned by respondent 909 Geary Street LLC.

The subject litigation arises out of the abysmal living conditions that existed at the Hotel Hartland. Individual rooms were filthy and infested with vermin. Walls were unpainted, ceilings were deteriorating, and windows were either broken or painted shut. Many mattresses were soaked with dried blood.

The common bathrooms in the hotel were rarely cleaned. Feces were smeared on the walls and were commonly left on the shower floor for long periods of time. The floors were littered with syringes and other drug paraphernalia.

Common hallways in the hotel were filled with dirty mattresses, used furniture, and trash. So much garbage was allowed to accumulate that it produced a powerful stench. Nonresidents were allowed to roam the hallways freely at night. They would buy and sell stolen merchandise and would demand money or cigarettes from residents.

The elevator at the hotel was frequently inoperable. This created a hardship for those residents who were elderly, disabled, and those with young children. The floor of the elevator was often soaked with urine.

Management at the hotel was aware of the conditions that we have described. Indeed, management fostered many of the problems because it allowed nonresident drug dealers and users to enter the hotel for a fee.

The intolerable conditions at the Hartland culminated in a massive fire that occurred on February 12, 1999. Nonresidents who gathered on the roof to smoke drugs tossed a burning object into a lightwell. The object landed on and set fire to trash that had been allowed to accumulate up to the fourth floor of the lightwell. The fire then spread to the rest of the building causing mass panic. As one resident later explained, "On the day of the fire, I was terrified and frantic. [I] [w]as first to hear [the] alarm and smell smoke. My cat ran out in panic and I never saw him again. I ran to everyone's doors and was knocking and yelling. I called 911. I was also trying to get Louis Arcari out and he was having a hard time putting on his prosthetic leg. Plus, I was worried about my cat who had run out the door. When I ran in James Neyland's room, flames were coming out from his ceiling. I stopped the firemen who were running [through] the halls and told them about the flames in Neyland's room and the lightwell. He began to

chop down the wall in front of me. Then I began searching for my cat, and helping Louis down the stairs. While going downstairs, I heard Ms. Baltodano screaming on the second floor. I told the firemen I would help her down the stairs with her walker. I sat her down in the front outside the hotel. After helping . . . Louis and Ms. Baltodano downstairs, I went back into the smoke to find Smokey. . . . Finally, the firemen and the Patels dragged me out of the building -- I was one of the last to leave. I was crying and weeping. . . . I became sick, trembling and could not stand up."

The fire had devastating consequences for the residents of the Hartland. Many were forced to move to other, sometimes worse residential hotels. Some became homeless and were forced to live on the street. Many suffered serious psychological problems. One resident described his experiences as follows: "Shortly after the fire, I went into a deep depression. I was put on Prozac. [I] began to severely [lose] weight (35 lbs. in a few months). I stopped eating and went down to 97 lbs. I couldn't sleep. Terrified of sirens. A few nights after being relocated, we had a fire next door and I became frantic. . . . Couldn't function even in the hotel that the Red Cross had placed me in. A fellow tenant at the Hartland, Allen Sumner[,] died in the hotel and I was the one to first discover him. The elevator was not working, and [A]llen had [AIDS] and asthma and pneumonia. The elevator was purposefully turned off by [management]. I was so sad and angry because Allen did not have to die. . . . I was relocated to several more hotels. I was destroyed, weeping all day."

In February 2000, 87 former tenants of the Hartland filed a complaint against 909 Geary and others.[1] The complaint sought damages under several theories including negligence, breach of the implied warranty of habitability and nuisance.

909 Geary tendered the defense of the action to its insurers, including appellant Admiral Insurance. Admiral and the other insurers provided 909 Geary with a defense; Admiral defended subject to a reservation of rights, having cancelled its policy effective June 10, 1999.

After what appears to have been extensive discovery, including lengthy depositions of the vast majority of the named plaintiffs, trial of this case was scheduled for November 2001. However, on September 10, 2001, just weeks before trial was scheduled to begin, Admiral rescinded 909 Geary's policy and ceased providing it with a defense.[2] On October 18, 2001, 909 Geary filed suit against Admiral, an insurance coverage action, alleging Admiral was obligated to pay any judgment that might be rendered.[3]

The case filed by the tenants proceeded to a bench trial on November 19, 20, and December 4, 2001. On November 26, 2001, plaintiffs amended their complaint limiting their claims to the period of time after January 20, 1999, when the Admiral policy was in effect. After the parties had presented all their evidence, and after the plaintiffs had submitted their proposed statement of decision, Admiral filed a motion to intervene. It argued 909 Geary had colluded with the plaintiffs to inflate the judgment. The trial court denied the motion ruling Admiral's motion was untimely. Admiral appealed that decision to this court.

The trial court ruled in favor of the plaintiffs awarding them $6,320,995 in damages. Admiral then filed a motion to vacate the judgment, again arguing the plaintiffs had colluded with 909 Geary to inflate the judgment. The trial court denied the motion ruling Admiral lacked standing.

On July 9, 2002, the trial court entered a final judgment awarding the tenant plaintiffs the damages set forth above plus $56,043.42 in costs. On July 29, 2002, Admiral filed a second appeal challenging the court's decision to deny its motion to

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1 The complaint also named as defendants several individuals who allegedly owned the 909 Geary. The individual defendants demurred to the complaint and were dismissed. That ruling has not been challenged on this appeal.

2 The rescission was based on 909 Geary's alleged failure to disclose material information on its application for insurance, including preapplication fires, crimes and losses at the property.

3 The record does not include a copy of that complaint. At oral argument, counsel for Admiral alluded to a second coverage action. That complaint is not in the record either. We do not know what theories of liability are alleged or what relief is sought.

vacate. We have consolidated both appeals for purposes of briefing, argument and decision.

II. DISCUSSION

A. Motion to Intervene

Admiral contends the trial court erred when it denied its motion to intervene. To put Admiral's argument into context, further background is necessary.

The plaintiff tenants sought damages from 909 Geary for the injuries they sustained prior to, during, and after the fire that occurred on February 12, 1999. Counsel for the tenants estimated that it would take approximately three months to try the case.

However, after Admiral rescinded 909 Geary's policy and ceased providing it with a defense, the plaintiff tenants and 909 Geary entered into a partial settlement. Among the terms of the complex agreement, two aspects are relevant here. First, 909 Geary agreed to pay plaintiffs $800,000 for injuries they had sustained *prior to* the date on which Admiral issued its policy to 909 Geary (i.e. January 20, 1999.) Second, the plaintiffs agreed to proceed to trial and to seek damages from 909 Geary solely for the period during which the Admiral policy was in effect. Plaintiffs assigned to 909 Geary their rights under any judgment that might be obtained. 909 Geary agreed it would then pursue a direct action against Admiral. 909 Geary agreed to divide with plaintiffs any amount it might receive from Admiral until plaintiffs' recovery totaled $1,000,000. 909 Geary alone would then be entitled to any amount over $1,000,000. The agreement obviously gave 909 Geary an incentive to maximize the amount of any judgment.

The case against 909 Geary was tried before the Honorable Kevin McCarthy beginning on November 19, 2001. 909 Geary contends on appeal that it disclosed to Judge McCarthy the terms of its settlement with the plaintiff tenants. That statement is not supported by any citation to the record. What is clear, however is that the ensuing trial was highly streamlined.

The parties stipulated that the court reporter could be excused. The plaintiffs then offered into evidence without objection 113 exhibits. Included were the depositions of 65 of the plaintiffs, many photographs showing conditions at the Hartland before, during,

and after the fire; inspection reports prepared by city agencies that described dangerous conditions at the hotel prior to the fire; interrogatory responses prepared by some of the named plaintiffs; and narratives prepared by the plaintiffs describing the emotional distress they had suffered.

In addition, six individual plaintiffs testified at trial. Counsel for 909 Geary did not examine any of them. Plaintiff also presented testimony from an expert who described the trauma the individual plaintiffs had suffered. Again, counsel for 909 Geary did not examine the witness. The testimony phase of the trial took less than two days.

Counsel for Admiral attended both days of trial testimony. Judge McCarthy acknowledged counsel's presence and asked whether she would like to participate in the trial. Counsel declined.

The case was submitted to Judge McCarthy on December 4, 2001. Thereafter, the plaintiffs prepared a proposed statement of decision requesting a total of $2.8 million in damages. 909 Geary submitted a two-page letter brief opposing the proposed statement of decision.

On February 22, 2002, after submission, but before judgment was entered, Admiral filed a motion to intervene. Admiral said it had learned during discovery in the coverage action 909 Geary had filed that the tenant plaintiffs and 909 Geary had entered into a settlement under which the plaintiffs had assigned to 909 Geary their right to proceed against Admiral. Based on that agreement, Admiral alleged 909 Geary was motivated to enhance that damages that would be awarded against it.

The trial court denied the motion ruling Admiral's motion was not timely.

Admiral now challenges that decision contending the trial court erred when it denied its motion to intervene.

Code of Civil Procedure section 387, subdivision (a) states: "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." The trial court is granted the discretion to determine whether intervention is

appropriate, and its ruling will be reversed on appeal only if the court abused its discretion. (*People v. Superior Court (Good)* (1976) 17 Cal.3d 732, 737.)

Applying that standard, we see no error. As the trial court noted, "if the insurance company wanted to be a part of this, my feeling is that the insurance company shouldn't have walked away when they did. . . . [W]hen the evidence was being presented . . . I asked you [at the beginning of trial] if you wanted to be part of this, and you said, 'I would like to, but I cannot.'" Furthermore, Admiral's motion to intervene came very late in the trial process. Again, as the court stated: "This [motion] is after the case is in, and this is after the arguments have been made, and this is after a . . . proposed statement of decision has been filed and objections . . . [have] been lodged . . . . I mean instead of leaving the case, it would have been possible to say, 'We don't think we have a duty to defend, but we would like to remain in the case to represent the interests of Admiral,' but that wasn't done." The trial court's analysis of this issue was reasonable. We conclude the court did not abuse its discretion when it denied Admiral's motion to intervene because it was not timely.[4]

Admiral contends the trial court erred because it filed its motion as soon as it learned from evidence obtained in the underlying coverage action that the tenant plaintiffs and 909 Geary were colluding to inflate the judgment. It is not clear whether there was in fact collusion. That is an issue that must await determination in a coverage action or a direct action under Insurance Code section 11580.[5] In any event, while evidence obtained in the then pending coverage action may have finally motivated Admiral to act, other, earlier evidence provided Admiral with notice that something was possibly amiss. Counsel for Admiral attended the trial that was completed on December 4, 2001. She witnessed the highly streamlined proceedings. She saw the unusual manner in which the evidence was presented. She knew that witnesses were not being examined.

[4] Having reached this conclusion, we need not decide whether Admiral lacks standing to pursue the present appeal because it is not an "aggrieved party" within the meaning of Code of Civil Procedure section 902.

The trial court considering these facts could reasonably conclude that Admiral could and perhaps should have filed its motion to intervene earlier.

Admiral also contends the trial court should have allowed it to intervene because it will be bound by the judgment rendered in this case should it later be determined that it did have an obligation to defend 909 Geary. However, a judgment between an insured and an injured party is only binding on an insurer where the facts have been adjudicated independently in a process that does not create the potential for abuse, fraud or collusion. (*National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449.) Admiral will have ample opportunity to argue that the judgment rendered in this case is not binding because it was the product of collusion.

B. Motion to Vacate

After the trial court entered a judgment awarding the tenant plaintiffs more than $6 million in damages, Admiral filed a motion to vacate. Admiral attached as an exhibit to its motion a copy of the settlement agreement 909 Geary and the tenant plaintiffs had executed. Admiral again argued that 909 Geary and the tenant plaintiffs had colluded to inflate the judgment. The trial court denied the motion ruling Admiral lacked standing.

Admiral now appeals contending the trial court erred when it ruled it lacked standing to vacate the judgment.

Code of Civil Procedure section 663 states, in part: "A judgment or decree, when based upon a decision by the court . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered . . . ." An aggrieved party is one "whose rights or interests are injuriously affected by the judgment. [Citations.]" (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) The interest at issue "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment. [Citation.]" (*Ibid.*)

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5 We need not and do not decide whether the tenant plaintiffs and 909 Geary *in fact* colluded to inflate the judgment. (Cf. *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 561.)

The court in *Tomassi v. Scarff* (2000) 85 Cal.App.4th 1053 (*Tomassi*), applied this standard when faced with very similar facts. There, an insurer, Reliance, refused to defend its insured, Campbell Towing, contending the damages sought were not covered by its policy. The case against Campbell Towing proceeded to a streamlined trial where evidence was offered without objection and witnesses were not cross-examined. As is the case here, the parties agreed to proceed without a court reporter. The trial court hearing the case rendered a judgment against Campbell Towing. Reliance then brought a motion to vacate the judgment arguing it was not supported by the evidence. The trial court denied the motion, and the appellate court affirmed, ruling Reliance was not an aggrieved party, "The *possibility* that Reliance will be bound by the judgment does not satisfy [the *Carleson*] standard . . . . Reliance clearly and repeatedly denied coverage under their policy and refused to defend this action. Reliance's real interest (paying under the policy) will be affected only if coverage is found. Until then, Reliance's rights have not been injuriously affected by the judgment." (*Tomassi, supra,* at pp. 1057-1058, internal quotation marks omitted.)

The *Tomassi* court also rejected the argument that Reliance had standing because the judgment in question might prejudice its rights in an underlying coverage action that had been filed. ". . . Reliance will not necessarily be bound by the finding that Campbell Towing was liable. An insurer that has received notice of the action against its insured but refuses to defend will be bound by the resulting judgment on all issues material to liability, in the *absence* of fraud and collusion. [Citations.] In the pending lawsuit by Campbell Towing against Reliance, Reliance will have the opportunity to assert not only that no coverage existed but also that the liability judgment was a product of collusion between Campbell Towing and [the plaintiffs]. [Citations.] If Reliance is successful on this issue, collateral estoppel will not be applied to establish Campbell Towing's liability." (*Tomassi*, *supra*, 85 Cal.App.4th. at p. 1058, fn. omitted.)

We reach the same conclusion here. Admiral rescinded 909 Geary's policy and has refused to provide it with a defense. That decision is now the subject of a coverage action that is pending in the San Francisco Superior Court. The fact that Admiral *might*

ultimately be liable to 909 Geary does not provide 909 Geary with standing in this case. Admiral lacks standing because it is not aggrieved.

Admiral contends the ruling in *Tomassi* is not controlling here because 909 Geary had other insurers who were available to defend it. That may be true, but it is irrelevant. The *Tomassi* court did not identify that factor as important in its decision. Indeed, it appears the defendant in *Tomassi* did have another attorney who was representing its interests. (*Tomassi*, *supra*, 85 Cal.App.4th at p. 1055.) In any event, the pivotal issue is not whether 909 Geary had another attorney, but whether Admiral is aggrieved by the judgment that was entered. Because Admiral's interest is remote and contingent, Admiral is not aggrieved.

We conclude the trial court correctly ruled Admiral lacked standing to vacate the judgment.[6]

III. DISPOSITION

The orders denying Admiral's motions to intervene and to vacate the judgment are affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Gemello, J.

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[6] Having reached this conclusion, we need not address the arguments Admiral has advanced to attack the judgment. Specifically we need not decide whether the tenant plaintiffs presented evidence that was outside the scope of the pleadings, whether the trial court properly awarded damages for emotional distress or increased rent, or whether the court properly awarded prejudgment interest.